

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING**



UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 74-1712

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In the Matter of
A Motion to Compel Arbitration

between
Interocean Shipping Company,

Petitioner-Appellee,

-and-

National Shipping and Trading Corporation and
Hellenic International Shipping, S.A.,

Respondents-Appellants.

PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee,
-against-

: Docket No. 74-1713

NATIONAL SHIPPING AND TRADING CORPORATION
and HELLENIC INTERNATIONAL SHIPPING, S.A., :

Respondents-Appellants. :

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BEFORE :

Clark, Associate Justice and
Moore and Timbers, Circuit Judges

PETITION FOR REHEARING

Respondent-Appellants hereby petition pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for rehearing on the opinion of this Court dated June 24, 1975, modifying and affirming an order entered April 15, 1974, in the Southern District of New York, Sylvester J. Ryan, District Judge, granting vessel owner's petition pursuant to the Federal Arbitration Act to compel arbitration of its claim for breach of a charter party.

THE ISSUES PRESENTED FOR REHEARING

Appellants respectfully submit that this Court overlooked or misapprehended the following points of law or fact:

I. This Court overlooked the limited judicial function authorized by Section 4 of the Federal Arbitration Act in allowing the ruling that National was a guarantor to stand once having ruled it was error to find that National was a party to any written agreement to arbitrate. Having ruled as it did in

this regard, this Court should have ordered the dismissal of the proceeding as to National and set aside all of the Trial Judge's findings and conclusions with respect to National.

II. This Court misapprehended the proper standard of proof and review required in determining whether National became a guarantor, a matter governed by the substantive law of New York as articulated in the Savoy case. It also misapprehended the uncontraverted evidence negating any agreement on a guarantee.

III. This Court overlooked and misapprehended the role of the charter broker, De Sajvo, accepted as an expert by the trial court, who himself definitively disclaimed 1) generally, that charter brokers act as agents and 2) specifically, that he had authority from National to effect or deliver its guarantee, the very existence of which, its form and content remained to be agreed upon by National. This was a keystone error below since it led into the clearly erroneous conclusion that the "fixture" telex satisfied the Statute of Frauds' requirements for a guarantee.

IV. This Court misapprehended the evidence as to trading limits. The uncontradicted documentary evidence clearly showed on its face that there was no agreement on this term, agreed by all to be essential to the consummation of a charter.

I

HAVING RULED THAT THE TRIAL COURT ERRED IN FINDING NATIONAL PARTY TO A WRITTEN AGREEMENT TO ARBITRATE, NO FURTHER QUESTIONS EXISTED AS TO NATIONAL UNDER 9 U.S.C. §4 AND THIS COURT SHOULD HAVE SET ASIDE THE FINDING THAT NATIONAL WAS A GUARANTOR AND ORDERED THE PROCEEDING AS TO IT DISMISSED.

The function of the trial court in a proceeding under 9 U.S.C. §4 is fixed and limited by the statute, in relevant part, as follows:

"If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

* * *

If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed."

A Federal Court, in a suit to compel arbitration under 9 U.S.C. §4 is debarred from dealing with any other issues other than "(1) the making of an agreement to arbitrate, and (2) the failure, neglect, or refusal of the other party to perform that agreement." Reconstruction Finance Corp. v. Harrisons Crosfield Ltd., 204 F. 2d 366, 368

(2d Cir. 1953) cert. denied, 346 U.S. 854 (1952). See also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); National R.R. Passenger Corp. v. Missouri Pacific R.R. Co., 501 F. 2d 423 (8th Cir., 1974); Warren Brothers Company v. Cardi Corporation 471 F. 2d 1304 (1st Cir. 1973); Hamilton Life Ins. v. Republic National Life Ins., 408 F. 2d 606 (2nd Cir. 1969); Galt v. Libbey-Owens-Ford Glass Company, 376 F. 2d 711 (7th Cir. 1967) 397 F. 2d 439, cert. denied, 393 U.S. 925 (1968); World Brilliance Corp. v. Bethlehem Steel Co., 342 F. 2d 363 (2nd Cir. 1965); Aberthaw Construction Co. v. Centre County Hospital, 366 F. Supp. 513 (M.D. Pa. 1973) aff'd without opinion, 503 F. 2d 1398 (3rd Cir. 1974); International U. of E., R.& M.W. v. Westinghouse Elec. Corp., 48 F.R.D. 298 (S.D.N.Y. 1969); Swift Industries, Inc. v. Botany Industries, Inc., 297 F. Supp. 1056 (W.D. Pa. 1969).

In reversing and remanding this case on the prior appeal for a §4 summary trial, the trial court was directed to limit its inquiry as regards National to:

"... whether [it] is a party to the charter agreement and hence to the arbitration agreement contained therein." 462 F. 2d 677 (App. 35)"

But the trial court exceeded that mandate, and the scope of inquiry under §4 when it framed the issue as to National:

"Discussion on the point is limited to whether National should be a party to this suit as surety of the charter party made by HELLENIC, one of the issues raised by the Court of Appeals" (App. 52, footnote 3,) (emphasis added)."

The trial court then went on to find (1) "the guarantee of performance was really a separate agreement" (App. 52); (2) that the broker, De Salvo, had authority as an "agent" to bind National to such guarantee; (3) that National agreed to the guarantee, and (4) that by virtue of such guarantee NATIONAL agreed to bind itself to the charter and hence the agreement to arbitrate.

Given the express mandate of this Court and the strict limits of the inquiry under §4, not only was the issue as framed by the trial court as to National clearly erroneous but its findings were equally erroneous. So long as the petitioner offered no evidence that it was contemplated that National was to be a party to the charter itself and hence any agreement to arbitrate, the issues of the guarantee, De Salvo's purported authority to act for National and whether the "fixture" telex satisfied the Statute of Frauds had no place in the trial court's determination of any issue under §4. Thus, it was not enough for this Court merely to modify so much of the trial court's order which directed National to arbitrate.

"While the court properly ordered Hellenic to arbitrate since Hellenic was a party to the charter agreement, we hold that it erred in ordering National to arbitrate since National was only a guarantor and not a party to the agreement."

What is required is that all rulings and findings of the trial court with regard to the alleged role of National as a surety, as to the alleged authority of De Salvo to bind National and that De Salvo's telex was sufficient to satisfy the Statute of Frauds be set aside as a matter of law. In the absence of any showing that National was to be party to the Mobiltime charter itself, such findings were neither directly nor collaterally necessary* to any issue properly triable on remand under §4 and such findings were beyond the province of the trial court.

* See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978 (2nd Cir. 1942) which points out:

"As the arbitration clause here is an integral part of the charter party, the court, in determining that the parties agreed to that clause, must necessarily first have found that the charter party exists. 26"

"26 The situation would be different if a separate arbitration agreement had been made." (p. 985)

II

THIS COURT MISAPPREHENDED THE PROPER STANDARD OF PROOF AND REVIEW REQUIRED ON THE ISSUE OF WHETHER NATIONAL WAS A GUARANTOR AND OVERLOOKED THE SIGNIFICANCE OF THE EVIDENCE NEGATING AGREEMENT ON A GUARANTEE.

If, as the trial court found, the guarantee was a matter of a separate agreement (App. 52), then the court below was precluded under §4 from considering that issue. If on the other hand, as the trial court also found, quite inconsistently, "the guarantee was an integral part of the negotiations for the fixture" (App. 51), this Court misapprehended the proper standard of proof and review applicable to that issue.

What constitutes a valid guarantee and what is necessary to bring one into legal existence are matters of substantive New York law. As this Court noted on the first appeal, 462 F. 2d 673, 678 "Merely agreeing to act as surety for a charterparty is not a maritime contract." The substantive New York law on the point, as stated in Savoy Record Co. v. Cardinal Export Corp., 15 N.Y.2d 1,6-7; 203 N.E. 2d 206, 254, N.Y.S. 2d 521,525-6 (1964) is

"The obligation of a guarantor, is admittedly, a heavy one and the courts should refrain from foisting such an obligation upon a party, be he individual or corporation, who simply signs as agent, absent the requisite clear and unequivocal evidence, to be gathered from the writing itself, that he intended to assume such a liability." (emphasis ours).

Hence, the standard of proof to be applied to the trial court's findings in this regard is not satisfied by reference to the clearly erroneous test or the presence of substantial evidence.

Such clear and unequivocal evidence must be found within the four corners of the "fixture" telex of March 17th. Under the controlling substantive law of New York it cannot be supplied by parole evidence extrinsic to the writing as was done below and overlooked in this Court's opinion. Not only was the "fixture" telex devoid of such evidence, the weight of the other evidence clearly showed that the form and content of the guarantee and the identity of the guarantor remained to be agreed upon.

(1) The trial court conceded that the alleged "fixture" telex "did not specifically state that the guarantee would be given by National" (App. 52). The telex read:

"CHARTERER: HELLENIC NATIONAL SHIPPING, S.A.
OF PANAMA, SUBSIDIARY OF NATIONAL SHIPPING AND
TRADING WITH APPROPRIATE LETTER OF GUARANTEE."

(2) Theodoracopulos testified that De Salvo was to send him the proposed form of guarantee desired by Interocean so that he could review it and De Salvo, the author of the March 17th telex, himself agreed that the guarantee "was an item which would have to be agreed upon after he [De Salvo] had passed some form of guarantee to [Theodoracopulos] to study." (See appellant's Main Brief, pp. 48-49)

(3) Interoccean wanted a guarantee (Tr. 30).

Following his telex of March 17th De Salvo prepared a form of guarantee and submitted it to Germano of Interoccean for approval. That form of guarantee as approved by Interoccean and which Interoccean and De Salvo had in mind, was not the guarantee of National but rather the personal guarantee of Harry Theodoracopulos (a proposition which had never even been suggested previously to Theodoracopulos).

(4) The text of the guarantee prepared by De Salvo and approved by Interoccean was:

"GUARANTY OF HARRY THEODORACOPULOS

Reference charter party dated March 17th, 1971,
between HELLENIC INTERNATIONAL SHIPPING, S.A.
OF PANAMA, and INTEROCEAN SHIPPING COMPANY,
Owners of the "Oswego Reliance" subject to
terms and conditions of above mentioned charter
party, I hereby guaranty the performance of
HELLENIC INTERNATIONAL SHIPPING S.A.

Harry Theodoracopulos
National Shipping & Trading Corp."
(App. 67 [emphasis added])

(5) That draft guarantee was never sent to either National or Theodoracopulos because, according to De Salvo, "We never got to that point" (Tr. 123).

(6) Finally, despite the minimization by this Court (footnote 10 of the Opinion) of the discrepancy between De Salvo's actual testimony that a letter of guarantee could

be given and the trial court's finding that a guarantee would be given, the guarantee according to the trial court itself "was a separate agreement"; the testimony of both Theodoracopulos and De Salvo was in accord that what Theodoracopulos told De Salvo with regard to a guarantee was that an appropriate guarantee "could be given." Hence, this Court's reliance on Theodoracopulos' alleged statement "You are confirmed" as evidencing an agreement to commit National to a guarantee is misplaced.

III

THIS COURT'S AFFIRMANCE OF THE FICTION THAT DE SALVO WAS AN AGENT EMPOWERED TO GIVE A GUARANTEE IS FRAUGHT WITH DANGER FOR CHARTER NEGOTIATIONS THROUGH CHARTER BROKERS.

This crucial holding that National was a guarantor for the performance of Hellenic, had nothing whatever to do with demeanor or credibility. It is a finding purely in the nature of a conclusion of law, "freely reviewable," as to which "this Court, on review, is in as good a position as the Trial Court to examine, interpret, and draw inferences ..." (see appellant's Main Brief, p. 22).

The entirety of the testimonial evidence as to De Salvo's agency was that De Salvo himself did not believe he was anybody's agent. Nor did anyone else so regard him. To such an extent that the Trial Court and counsel during the course of trial all affirmatively concurred that De Salvo was nobody's agent, and his agency was definitely not an issue in the case (Tr. 151-154).

Subsequently, in reaching its findings and conclusion, it was seen by the trial court that it was absolutely indispensable to its conclusion that National was a guarantor to hold that De Salvo was in fact National's agent to bind it through the telex "fixture", thus supplying the necessary "writing" to overcome the barrier of the Statute of Frauds.

This Court has sanctioned the trial court's reversal of ground by holding that "Agency is a legal concept which depends on the manifest conduct of the parties, not on their intentions or beliefs as to what they have done." We respectfully submit that to convert a charter broker into an agent by judicial application of a legal label flies in the face of the evidence in this case, testimonial and documentary, the custom of the trade, and common sense (see appellant's Main Brief, pp. 59-61).

The well recognized practice in the chartering trade in New York is that a charter broker will not himself sign a charter party "as an agent" without express written authority of the party on whose behalf he is signing, and in no event would a charter broker undertake to execute a guarantee for one of the parties ancillary to the charter negotiations without explicit written authorization.

That charter brokers require explicit and written authority to sign such instruments has been given judicial

recognition and is evident from Christman v. Maristella Compania Naviera, 349 F. Supp. 845 (S.D.N.Y. 1972) aff'd without opinion 468 F 2d 620 (2d Cir. 1972). In Christman the authority of Holder, the London Broker, and of Boyd, its New York cable correspondents, to conclude a fixture and to execute a charter for the owner's account, was the subject of express written authority. The charter party itself was executed for Houlder by Boyd under the signature of Boyd's president "for and on behalf of Maristella Compania Naviera of Piraeus by cable authority from Howard Houlder & Partners Ltd., Boyd, Weir & Sewell, Inc. brokers" (349 F. Supp. 845, 851).

Interocean's counsel have explicitly recognized that De Salvo was not an agent. They state in their Brief on Appeal, page 39, "Under the law of New York, De Salvo had the power to bind National in this transaction even though he was not the agent of National." (emphasis ours).

To sustain the trial court's patently egregious finding that a charter broker, notwithstanding his own express disclaimer of any such authority, was somehow an "agent" empowered to execute a written memorandum evidencing a \$3,500,000 guarantee would do nothing less than introduce legal havoc into charter party negotiations through brokers in New York.

THIS COURT MISAPPREHENDED THE EVIDENCE
ON TRADING LIMITS.

This Court's opinion misstated the record below when at page 4325 of the slip opinion it recited that H.T. asked for a modification "to permit trading with Communist China" and that Interocean could not agree because the crew was Nationalist Chinese.

The facts are that a vessel, such as the OSWEGO RELIANCE with a Nationalist Chinese crew, cannot trade with any communist country and this was an exclusion which Interocean had to have. Yet, the nationality of the crew was not communicated to appellants at any time during the negotiations and the alleged "fixture" telex of March 17th showed only the exclusion of Communist China, Cuba, North Korea and Vietnam (Tr. 227, App. 61, p. 2, also Appellant's Main Brief, pp. 34-35).

This amounted to a major and undisclosed restriction on the potential charterer's world wide trading privileges since communist controlled countries, especially Russia, Rumania, East Germany, Yugoslavia, Bulgaria and Poland figure prominently in world oil trade and in the grain and bulk trades for which the OSWEGO RELIANCE, as an oil-ore carrier, was designed.

The significance of this error is that all witnesses who testified on the point agreed that trading limits are an essential term of any charter. Hence this Court's mistaken overlooking of the fact that agreement had not been reached on this term undermines the affixance of the finding that agreement had been reached on all the essential terms of a charter.

Summary

Entirely apart from the misapprehension and oversights set forth herein, it seems plain that without an agreement on the guarantee there was no agreed-upon deal, no charter. The whole import of the evidence on this point, both documentary and testimonial, is uncontradicted -- Interocean made a guarantee a condition of the deal (Tr. 30). Agreement on the guarantee was itself one of the essential terms necessary to constitute a meeting of the minds on the charter. If it did not come into existence, was not agreed upon, then neither did the charter (See Appellant's Main Brief, pp. 47-51).

It has been the contention of Interocean throughout all its pleadings and throughout these proceedings that the obligations of Hellenic and National came into legal existence on March 17, 1971 and were embodied in the "fixture" telex. The trial court so found, and this Court has sustained that finding. Under the Savoy decision, supra, page 7, in the absence of clear and unequivocal evidence of the agreement of National to give a guarantee and of De Salvo's authority in that regard to be gathered from the telex of March 17th itself, the trial court's findings that there was a meeting of the minds as to all the essential terms and that National was a guarantor cannot be sustained. The findings of the trial court as to a guarantee were not supported by the requisite clear and unequivocal evidence but were predicated upon the legal fictions that De Salvo,

notwithstanding his express disclaimer of any agency, was somehow the agent of National for purposes of giving the guarantee and that the words "APPROPRIATE LETTER OF GUARANTEE" somehow made the fixture telex a memorandum sufficient to satisfy the rigorous standards of the Statute of Frauds.

Conclusion

We respectfully submit that that kind of overlooking and misapprehension of points of law and fact has been shown on this Petition which should lead this Court to dismiss the Appellee's case.

Respectfully submitted,

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